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Supreme Court, U. S.
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IN THE SUPREME COURT OF
THE UNITED STATES

Spring Term, 1974

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ANTHONY STANBACK,

Petitioner

- v -

STATE OF NORTH CAROLINA

Respondent

* * * * * * * * * * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * * * *

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TABLE OF CITATIONS

United States v. Russell, 93 S. Ct. 1637

Sorrells v United States, 53 S. Ct. 210

Sherman v United States, 78 S. Ct. 819

Olmstead v United States, 48 S. Ct. 564

Kinsella v United States ex. rel Singleton, 80 S. Ct. 297

STATUTES INVOLVED

NC GS 90-95 (a) (1) and (b)

NC GS 7A-271

NC GS 7A-27(b)

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1974

* * * * * * * * * * * * * * * * * * *

ANTHONY STANBACK,

Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

* * * * * * * * * * * * * * * * * * *

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner prays that a Writ of Certiorari issue the Supreme Court of North Carolina, which Court last heard this case on petition for Certiorari to the Court of Appeals of North Carolina and denied the petition pro forma, and to the Court

of Appeals of North Carolina, which Court wrote the opinion in this case in State of North Carolina v Anthony Stanback.

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J U R I S D I C T I O N

The jurisdiction of this Court is involved under 28 U. S. Code 1257(3). Petition is made to this Court to review the opinion of the Court of Appeals of North Carolina in STATE OF NORTH CAROLINA vs. ANTHONY STANBACK, 7318 SC 617, and the denial of a petition for Certiorari by the Supreme Court of North Carolina to the Court of Appeals of North Carolina. The petitioner petitioned the Supreme Court of North Carolina to issue the Writ of Certiorari to the Court of Appeals to review the opinion of the Court of Appeals of North Carolina, but the petition was denied on November 1, 1973. The petition to the Supreme Court

of North Carolina was made in apt time under the Supplementary Rules of Practice of the Supreme Court of North Carolina, Rule 2 and the petition was denied on November 1, 1973 and certified to the Court of Appeals of North Carolina on November 2, 1973.

The petition for certiorari to the Court of Appeals of North Carolina was made to the Supreme Court of North Carolina to exhaust all State remedies before applying to this Court. The matters raised here were raised in the Courts below. Jurisdiction of the Court is thus invoked within the time allowed by Rule 22 of the Revised Rules of the Supreme Court of the United States.

A copy of the opinion of the Court of Appeals of North Carolina and a copy of the Order denying Certiorari by the Supreme Court of North Carolina are attached as is required by Rule 23 of this Court.

QUESTION PRESENTED

IS IT CONSTITUTIONAL ERROR TO DENY A MOTION FOR JUDGMENT OF NON SUIT IN A TRIAL WHERE AN OTHERWISE INNOCENT CITIZEN ACQUIESED TO THE REPEATED SOLICTATIONS OF AN UNDER-COVER POLICE AGENT TO PURCHASE FOR HIM SOME MARIJUANA, WHEN THE POLICE INITIALLY CONCEIVED A PLAN WHICH WOULD INVOLVE THE INNOCENT CITIZEN IN CRIMINAL ACTIVITY AND WHEN THE POLICE SUPPLIED AN ELEMENT, WITHOUT WHICH THE CRIME COULD NOT HAVE OCCURRED?

STATEMENT OF CASE

This case was tried in the Superior Court of North Carolina, which is the court designated by statute for the trial of felonies, North Carolina General Statute 7A-271. The case was tried upon a plea of not guilty to a charge made in an indictment of possession with intent to distribute a Controlled Substance. The case was tried to a jury, which returned a verdict of guilty. The court imposed a sentence of 3 years imprisonment in the State Department of Corrections of North Carolina.

During the trial of the case the defendant properly imposed his

constitutional objections. His exception to the denial of his motion for judgment as of nonsuit was made but it was not couched in constitutional objections. His exception to the denial of his motion for judgment as of nonsuit was made but it was not couched in constitutional terms. The case was appealed to the Court of Appeals which is the North Carolina Court designated to handle all criminal appeals except those of a capital nature, North Carolina General Statutes 7A-27(b). That court, in finding no error, failed to respond to the issue of entrapment. Subsequent thereto, and in apt time, petition was made to the Supreme Court of

North Carolina in order to exhaust all state remedies. That Court denied the petition pro forma November 1, 1973. The case is brought here within the time allotted by the rules of this Court because there is no other recourse but to seek Federal relief, since State remedies have been exhausted.

REASON FOR GRANTING WRIT

IS IT CONSTITUTIONAL ERROR TO DENY A MOTION OF JUDGMENT AS OF NON SUIT IN A TRIAL WHERE A OTHERWISE INNOCENT CITIZEN ACQUIESED TO THE REPEATED SOLICITATIONS OF AN UNDER-COVER POLICE AGENT TO PURCHASE FOR HIM SOME MARIJUANA, WHEN THE POLICE INITIALLY CONCEIVED A CRIMINAL PLAN WHICH WOULD INVOLVE THE CITIZEN AND WHEN THE POLICE SUPPLIED AN INDISPENSIBLE ELEMENT, WITHOUT WHICH THE PARTICULAR CRIME COULD NOT HAVE OCCURRED?

The Writ of Certiorari should be granted in this case to decide in a proper manner whether this petitioner and all others like him

all over the country can be convicted of possession with intent to distribute marijuana, after being sought out on three separate occasions, by a police cadet, acting as an undercover agent, who prior to such occasions, did not know the defendant nor had any personal information about the defendant in light of the United States Supreme Court decisions of U. S. v Russell 93 S. Ct. 1637 (1973) Sorrells v U. S. 535 Ct. 210, Sherman v U. S. 78 S. Ct. 819 and Olmstead v U. S. 48 S. Ct. 564.

In Olmstead v U. S., Justice Holmes wrote "The power of government is abused and directed an end for which it was not constituted when employed to promote rather than

detect crimes and to bring about the downfall of those who left to themselves might well have obey the law. As the majority of the Court in U. S. v Russell held;" "The focus is on the predisposition of the defendant to commit the crime." 93 S. Ct. 1641 (1973). The record of the instant case is devoid of evidence to the effect that the defendant was pre-disposed to commit the crime he was convicted of before he was sought out and persuaded to commit it by the government agent, Police Cadet, Jerome White.

At trial, the defendant exercised his Constitutional right under the 5th amendment and chose not to testify. Consequently no evidence

one way or another as to his disposition to commit a drug offense can be ascertained from the petitioner. The State of North Carolina's chief witness, police cadet Jerome White, testified that before he initially sought out the petitioner to induce him to get some marijuana for him, he did not know the peitioner. The record also reveals that Cadet White had had neither prior personal contact with the defendant, nor any personal knowledge of him. The record further reveals that the undercover agent, on more than one occasion, unsolicitedly prevailed upon and induced the defendant to act as his agent, and make a purchase of marijuana for him in order that he might obtain evidence to convict

the defendant.

In Sorrells v U. S., supra the Court held that "criminal activity is such that stealth and strategy are necessary weapons in the arsonal of the police officer. However, a different question is presented when the criminal design originates with the officials of the government, and they implant in minds of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." As alluded to supra, the record reveals that the undercover agent neither knew the petitioner, nor had any personal knowledge of him prior to their initial meeting. These facts take on monumental

significance when considered with the fact that the police undercover agent White was apparently soliciting and inducing the petitioner on his (White's) own initiative and not upon the initiative, order, or information supplied by anyone else. At trial Police cadet White testified that he had been directed by Officer N. McMillan to go up to the door of the petitioner's residence and ask for Anthony Stanback. However, Cadet White categorically denied that Officer McMillan, who accompanied him on two occasions, gave him any instructions to go see Anthony Stanback to get Anthony Stanback to take him where he (Cadet White) could buy some marijuana. The petitioner contends

that there is a legally significant difference between instructions to go up to someone's door and ask for that someone to take him where he could buy some marijuana. The petitioner contends that there is a legally significant differnce between instructions to go up to someone's door and ask for that someone, and instructions to go see someone go get that someone to take him where he could buy some marijuana. The petitioner further contends that when Cadet White went up to the defendant's door and asked for Anthony Stanback, he had done all that he had been instructed to do and Cadet White subsequent conversations, inducements, and transactions with the petitioner leading up to his purchase of marijuana through

the petitioner were acts predicated solely upon his own initiative and not based upon any direction, instruction or information of anyone else. Consequently, since Cadet White was acting on his own initiative and information seeking out the defendant to get him to buy some marijuana for him, and since Cadet White's very own testimony reveals that he had no personal knowledge of the petitioner nor had he said a thing in the world to him about marijuana before their initial meeting, it is an unescapable conclusion that Cadet White was soliciting marijuana from the defendant when he had no information upon which to base an opinion that the defendant was predisposed to

be anything other than an innocent man as described in Sorrells supra, and who, if left alone, might well have obeyed the law see Olmstead, supra.

None of the other STATE'S WITNESSES, Officer McMillan, Dr. Charles H. McDonald, Sylvester Daughtry nor Larry Gibson made any mention of or reference to the petitioner's disposition to commit drug related offenses during their testimony.

The petitioner contends that the crucial point in time to determine whether he was predisposed to commit an offense of this nature is at the initial meeting of the petitioner and the governmental agent. This was the first time the subject of drugs

or commission of a drug related crime takes on additional significance in his case and all other cases like his where the record reveals that there occurred a series of meetings, conversations, solicitations or transactions between the police agent and the defendant, which lead to the act of possession which constitutes the offense. It is common knowledge that an otherwise innocent person can be exposed to a criminal idea, and even though not predisposed to commit a crime, can be induced and persuaded to commit by repeated solicitations of a governmental agent. As Justice Holmes in Olstead supra observed "Human Nature is weak enough and sufficiently beset by temptation

without adding to them and generating crime." In this vein, the record reveals that Police cadet White unsolicitedly, and upon no apparent information, sought out the petitioner at his own legal residence to effect the initial meeting of the two parties. That the police cadet White admitted that he, and not the defendant initiated the conversation concerning "copping some grass" for him. It must be remembered that cadet White testified that he had by temptation without adding to them and generating crime." In this vein, the record reveals that Police cadet White unsolicitedly, and upon no apparent information, sought out the petitioner at his

own legal residence to effect the initial meeting of the two parties. That the police cadet White admitted that he, and not the defendant initiated the conversation concerning "copping some grass" for him. It must be remembered that Cadet White testified that he had no knowledge of the defendant before their initial meeting. The evidence further reveals that cadet White unsolicitedly sought out the defendant at his home on at least one other occasion on route to persuading him to act as his agent. That the evidence further reveals that cadet White sought out the petitioner on at least three separate occasions, and that on all three occasions, he sought out the petitioner for the

sole purpose of getting the petitioner to "cop some grass" for him so that he might prosecute him. The petitioner contends that even though he was not initially disposed to do so the prohibited criminal act, he was nevertheless persuaded to do so by the repeated solicitation of an overzealous, and ambitious police cadet, aspiring to prove himself worthy of a position on the Greensboro Police force. The petitioner further contends that had it not been for those persistent solicitations, he would not have thought about, much less have done, the prohibited act.

In Sherman v U. S. (78 S. Ct. 810) the Court declined to sustain the government's claim that the

petitioner evinced a "ready compliance to accede to Kalchinian's (police informer's) request" thus revealing a predisposition to commit the act, because there was no evidence that the petitioner himself was in the trade (despite the fact that the defendant had two prior convictions for sale and possession of narcotics) and that there was no significant evidence that petitioner ever made a profit on any sale to Kalchinian.

The record in the instant case reveal no prior convictions or even arrests of the defendant for any drug related offenses. Furthermore the record reveals through the testimony of Cadet White that the only mondy given to the defendant over and above the twenty dollars

actually required to purchase the marijuana, was a five dollar "play" unsolicitedly offered by cadet White. Cadet White testified that a "play" is similar to a "tip". Cadet White's testimony reveals that he unsolicitedly offered the money "play" to the defendant after the petitioner delivered the marijuana to him.

The petitioner contends that there are fundamental differences between the concept of "profit" and "tip." Whereas a profit in some way represents a predetermined monetary benefit or advantage occuring to one from the conduct of business, a "tip" is a small gift of money especially to a servant or employee or someone else for

for a service done; a gratuity. See Webster.

A profit is an anticipated benefit figured into and in fact is a part of the price paid by the purchaser to the seller. As the record of the instant case reveals, cadet White was indeed the purchaser. However, the petitioner was not the seller, but an agent for cadet White in this one transaction. Therefore, if any profit was made, the petitioner didn't make it, but the person who sold the marijuana to police cadet White through the petitioner made it.

As the Court in U. S. v Sorrells observed, "a different question is presented when the

Criminal design originates with the officials of the government...." In Sorrells, the undercover agent (Martin) testified that he was "the first and only person among those present at the occasion of the initial meeting who said anything about securing some liquor, and that his purpose was to prosecute the defendant for procuring and selling it. Sorrell v U. S. 53 S. Ct. 212. In the instant case, government agent White testified on cross-examination that "It was on the 6th that I went there (defendant's residence). I was taken there by Mr. McMillan. Mr. McMillan is a member of the Greensboro Police Department. He directed me to go up to the door and ask for Anthony

Stanback and this was the first time I had seen the young man. I had never seen him before in my life and when I went there on the 6th, I went there for the purpose of having him try to get some grass for me. Before that time, he hadn't said a thing in the world to me about marijuana or grass. He didn't even know me. When I went to see him at 12:00 noon the next day, it was my intention to have him get some grass for me.

As occurred in the Sorrell's Case, the undercover agent's own testimony reveals that he, and not the defendant brought up the subject of procuring contraband (in this case, marijuana) for the undercover agent. Cadet White's testimony

is that "Mr. Stanback told me he didn't have anything." The petitioner contends that this statement was his response to the informer's initiative statemnts about drugs. The fact that the police informer testified that the petitioner told him "that the next day, which was December 7th he would be at A & T University, and told me to meet him over there at approximately 12:00 noon does not lead one to the conclusion that the petitioner intended to have some marijuana at that time, or at that place. There is no direct testimony to support that contention. The testimony only reveals that the petitioner intended to be at a certain place at a certain time. The alleged

statement by the petitioner takes on even less significance as an indication of the petitioner's eagerness to get involved with marijuana, when it is viewed with the fact that the defendant didn't even show up the next day as he allegedly said he would.

Not only did police cadet White initiate the aforementioned discussion, but Police Detective McMillan furthered cadet White's design to induce the defendant to "cop some grass" for him by giving cadet White money for the very purpose of effecting a buy. As in Sorrells, the facts of the instant case make it clear that the criminal

design originated with governmental agents, who, after initiating a conversation with the defendant concerning the procurement of drugs, then supplied the money, without which there could not have been any possession upon which to base a conviction of possession with intent to distribute by the defendant. The illicit possession of marijuana with intent to distribute is by nature an isolated criminal incident and not a continuing, though illegal business enterprise as was the case in U. S. v Russell 93 S. Ct. 1637 (1973). In Russell, the petitioners were involved in the illegal manufacture of amphetamines.

They admitted that they had been continously engaged in the manufacture before and after infiltration into the drug ring by the undercover agent. The petitioners admitted making the amphetamine continuously before and after those batches made with the bottle of "propanone", (which was an essential ingredient in amphetamine manufacturing) supplied by the undercover agent. The Court held that since the operation was carried on before and after the drug ring had been infiltrated, and propane, though difficult to obtain, had nevertheless been obtained from another source and used in the manufacture, the conduct of the governmental agent in supplying

a bottle of "propanone" stopped far short of violating that fundamental fairness, shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment. Kinsella v U. S. ex rel. Singleton, 361 U. S. 234, 246, 80 S. Ct. 297, 304.

The nature of the offense in the Russell case can be readily distinguished from that the nature of the offense in the instant case. In Russell, the criminal activity involved consisted of the illicit manuafacture of drugs, which was not a sporadic, isolated criminal incident but a continuing, though illegal business enterprise. In

the instant case, the incident which precipated the arrest and subsequent conviction of the petitioner was not a continuing, but an isolated criminal incident. The crime in the instant case involved a mementary possession of narcotics. The police cadet approached the defendant and induced him to make one buy for him. In making that one isolated buy, the petitioner momentarily possessed the marijuana in the capacity of an agent. The petitioner never manufactured any drugs nor is there evidence that he possessed drugs at any other time than on this isolated occasion.

In order for the defendant to possess the marijuana on this particular occasion, it was mandatory

that he present twenty dollars to the seller of the narcotics. This was an indispensable act on the agents' part, because without the twenty dollars provided by Officer McMillan to cadet White to give to the petitioner the petitioner would have lacked the thing necessary to possess the narcotic. If the money had not been provided to the petitioner, then there could have been no crime to prosecute the petitioner for. The money was an indespensible element because without the money in his possession, the defendant, as the purchasing agent for cadet White, would not have had the capacity to become possessed of the narcotics.

The instant case must be

distinguished from the one where the police agent gives the twenty dollars directly to the seller of the narcotics in return for which, the seller gives the agent a quantity of marijuana. In that case, the seller is already possessed of the marijuana either before the money is given to him, or for some period is possessed of both the money and marijuana at the same time. In the instant case, where the petitioner is acting solely as an agent of the government informer White, he could never possess the money and the marijuana because of the nature of the agency capacity. But more important, the petitioner could not possess the marijuana unless and

until he delivered the money supplied by the police to the seller-in-fact.

In Russell, the court held that because of the ongoing, continuing criminal enterprise the petitioners were involved in, before as well as after the police agent provided the essential ingredient, those petitioners didn't necessarily have to make use the bottle of "propanone" supplied by the police agent at that particular time to carry out their criminal plan. In the instant case, if it had not been for the money given to the defendant at the particular time for a single particular purchase on this isolated occasion,

there could have been no criminal incident. The criminal act of the petitioner of acting as the informer's purchasing agent was a one-shot affair with a discernable beginning and discernable end. If police cadet White had refused to give possession of the twenty dollars to the petitioner before he, the petitioner, handed him the narcotics, then the petitioner would have been the seller's agent and not the agent of the buyer. There is no evidence that he was. If the petitioner had bought the marijuana from the seller and resold it to the police cadet, the petitioner would have been in fact a seller, and no agency would have arisen at all.

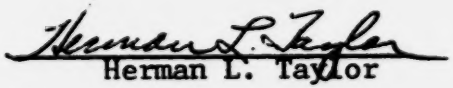
The fact that the defendant was acting as the agent of police cadet White, when viewed in conjunction with the facts that by nature, the type of criminal transaction involved is but an isolated one-shot incident and that the twenty dollars given by cadet White to the defendant was indespensible to the petitioner's act of possession because of the agency relationship, makes the conclusion inescapable that the law enforcement officers conduct here in conceiving a plan and providing the money required for the possession of the marijuana by the petitioner violates fundamental fairness and is shocking to the universal sense of justice man-

by the Due Process Clause of the fifth Amendment. Kinsella v U. S. ex Rel. Singleton, Supra.

C O N C L U S I O N

The record in this case reveals clearly that the petitioner did not receive a trial that comported with due process. This Court should grant certiorari to right the wrong committed in this case, and to thereby instruct the court of this country in the proper procedures to follow in cases of this nature.

Respectfully submitted,



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NO. 7318SC617 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT
OF APPEALS

STATE OF NORTH CAROLINA

v From Guilford

ANTHONY STANBACK

Appeals by defendant from Crissman, Judge, 9 April 1973 Session of Superior Court held in Guilford County.

Defendant, Anthony Stanback, was charged in a two count bill of indictment, proper in form, with feloniously possessing more than five grams of a controlled substance, to wit: marijuana, to

Jerome White. Defendant pleaded not guilty and only the State offered evidence at the trial.

The defendant was found guilty as charged and from a judgment imposing a prison sentence of three years, he appealed.

Attorney General Robert Morgan and Associate Attorney Henry E. Poole for the State.

Lee, High, Taylor, Dansby & Stanback by Herman L. Taylor for the defendant appellant.

Hedrick, Judge. Defendant assigns as error the denial of his motions for judgment as of nonsuit. The evidence when considered in the light most favorable to the State tends to show the

following:

On the night of 7 December 1972, Jerome White, an undercover agent of the Greensboro Police Department, went to the apartment of defendant seeking to purchase some marijuana which the defendant had promised to sell to Officer White the previous day. Defendant stated that he did not have "anything on him there at the house, but he do know where he could get some". Defendant then asked White how much he wanted and when White stated "one ounce", the defendant informed him that this would cost twenty dollars. After this brief conversation, White gave defendant the twenty dollars. Defendant and White went together in defendant's

car to an apartment in another part of the City. While White waited in the automobile, Stanback went into an apartment and returned in about five minutes. White testified, "When he got back to the car, he handed me a plastic bag containing green vegetable material. I did not have a conversation with him at that time. There were contents in the bag. It was a green vegetable-like material, seemed to be ground in a course type form."

After the purchase of the marijuana, defendant and White returned to defendant's apartment where, according to Officer White, defendant made the following statement: "Anytime you need anything,

an ounce or a lid or a pound, I can get it for you." White gave the defendant five dollars more as a "tip". The contents of the bag delivered to White by the defendant were subsequently analyzed and identified as marijuana.

In our opinion the evidence offered by the State was sufficient to require the submisssion of the case to the jury and to support the verdict. This assignment of error is overruled.

Next, the appellant asserts the court committed prejudicial error in failing to charge the jury on the law of entrapment. In order for the defense of entrapment to be available to defendant there must be an intent to

commit a crime and such intent must originate from the inducements of a law officer or this agent and not in the mind of the defendant. State v. Burnette, 242 NC 164, 87 S.E. 2d 191; State v Yost, 9 N.C. App. 671, 177 S.E. 2d 320. In the instant case the evidence demonstrates the fact that the police of Greensboro did nothing more than afford defendant an opportunity to voluntarily commit a crime which defendant conceived in his own mind. Such police action did not involve persuasion, fraud, or trickery but rather merely provided defendant with an exposure to temptation and thus there was no prejudicial error in

the failure of the trial judge to instruct on the defense of entrapment.

No Error.

Chief Judge BROCK and Judge BALEY concur.

No. 67PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1973

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STATE OF NORTH CAROLINA v ANTHONY STANBACK	ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE N. C. COURT OF APPEALS

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This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 1st day of November 1973, by the Chief Justice and Associate Justices of the Supreme

Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the N. C. Court of Appeals and to counsel for all the parties.

Witness my nad and official seal, this the 2nd day of November, 1973.

Clerk of the Supreme Court

cc: Lee, High, Taylor, Dansby & Stanback, Attorneys at Law
Mr. William Douglas Albright, Solicitor
Mr. Norman L. Sloan, Associate Attorney

MICHAEL RODAK, JR., CLERK
JAN 31 1974